Supreme Court, U.S.
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In The
Supreme Court of the United States

William Gerald Whyte, Petitioner,

- vs. -

State of New York, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the information provided to the police by Petitioner's physician, and the physician's testimony in a state grand jury, both in violation of Petitioner's physician-patient confidentiality privilege require that the ultimate conviction be reversed?

2. Did the use at trial of a journal prepared by Petitioner for his attorney's use, and unlawfully seized by the police during a search violate Petitioner's Fourth and Fifth amendment rights so as to require reversal of the conviction?

3. Did the surreptitious recording of a telephone conversation between Petitioner and an informant, which was used against him at trial violate Petitioner's fifth and Sixth Amendment rights so as to require reversal of the conviction?

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner William Gerald Whyte respectfully submits this petition for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The decision of the New York Court of Appeals is reported at 10 NY 3d 872 (May 8, 2008), and is reproduced in the Appendix at A-4.

The decision of the Supreme Court, Appellate Division, Fourth Judicial Department is reported at 48 A.D.3d 1040, 850 N.Y.S.2d 316 (NE 2d citation is presently unavailable), and is reproduced in the Appendix at A-2.

JURISDICTION

The final judgment of the New York Court of Appeals denying further appeal was filed on May 8, 2008, and Petitioner's time to file the Petition has been extended to October 6, 2008. This Court's jurisdiction is invoked pursuant to Title 28 USC §1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 USC §1257 (a), which provides authority for jurisdiction; U.S. Constitution, Fourth, Fifth, Sixth and Fourteenth Amendment.

STATEMENT

In April, 2005, Petitioner was visited by his son, who confronted Petitioner with a letter purportedly written by the son's daughter M (anonymous) essentially accusing Petitioner - her grandfather - of improper sexual contact with M.

Petitioner then sought help from his physician and a possible referral to a psychiatrist.

His physician happened to be unavailable, and he was seen instead by another physician, Valerie Altavas, MD. After hearing Petitioner's reasons for seeking psychiatric help, Dr. Altavas advised him that she would have to make a report to the New York State Child Protective Services ["CPS"], which she did.

Petitioner then sought advice from an attorney, who advised him to prepare a diary or journal of the relevant facts

for his review, which Petitioner did.

In fact under New York law the physician was not required to make any such report, and the agency so informed her. The representative of CPS refused to take the report or complaint because the facts did not meet the statutory standards.

According to Dr Altavas' records, she was told by the CPS representative that she could contact the police. Instead, she asked the representative to make the contact for her.

Shortly thereafter, Dr. Altavas was contacted by a State Police investigator, and the doctor not only revealed what Petitioner had told her, but showed the investigator her notes of the interview with the Petitioner, a clear violation of the physician-client privilege, according to N. Y. CPLR §4504.

Separately, M's mother, the Petitioner's daughter-in-law, had contacted the police in Toronto, Canada, where she and M lived. They in turn contacted the State Police in Canandaigua, NY where petitioner lived.

Investigator Trimble, of the N. Y. State police visited M's mother in Toronto, and persuaded her to make a telephone call to Petitioner in an effort to obtain either incriminating evidence or perhaps an admission. Investigator Trimble coached the mother and the call was recorded. Petitioner did make incriminating statements to his daughter-in-law which were later introduced at trial.

In the meantime, as part of the investigation triggered by Dr. Altavas improper report to the police, the State Police obtained a search warrant, specifically aimed at obtaining material possibly stored on Petitioner's computers, including any material possibly downloaded from the internet or other

sources. No such material was found, but during the search, the police opened and looked in a drawer of a night table in the bedroom and discovered the journal being kept by Petitioner at his attorneys direction. The officer then read part of the journal and seized it. It was later introduced at the trial as evidence against Petitioner.

Seizing the journal, even reading it, was a clear violation of Petitioner's Fourth Amendment rights because the warrant never mentioned any material other than computer related material [the warrant is reproduced in the Appendix at A-5].

Petitioner's trial counsel objected to the use of the journal and moved to suppress it. The motion was denied on the grounds that the motion was untimely under New York procedural law.

Dr. Altavas was later subpoenaed to testify before the Ontario County, NY grand jury as to the conversations she had with the Petitioner. In calling the police by proxy and in testifying before the grand jury, Dr. Altavas violated the physician-patient privilege found in NY CPLR §4504, which, as in most jurisdictions, is a privilege of the patient, and cannot be waived by the physician.

Subsequently, petitioner was indicted, and Dr. Altavas was also subpoenaed to testify at the trial. On petitioner's motion via counsel, the trial court would not allow Dr. Altavas to testify at the trial because of the physician-patient privilege, but the doctor had already revealed confidential information to the grand jury, and the damage was already done.

REASONS FOR GRANTING THE PETITION

There are three Constitutional violations at issue: 1: The information supplied to the authorities by Dr. Altavas and her testimony at the grand jury violated Petitioner's confidentiality privilege in violation of the N. Y. statute (CPLR 5104). That resulted in the police obtaining other incriminating evidence which was "fruit of the poisonous tree" and violated Petitioner's Fifth Amendment rights.

2: The search warrant obtained by the police to search defendant's home was specifically limited to a search for computer generated or stored material and nothing else. Therefore, reading the journal kept by Petitioner was outside the scope of the search, and seizing the journal and using it at trial violated Petitioner's Fourth and Fifth Amendment rights.

3: The surreptitious recording of the conversation between the petitioner and his daughter-in-law was part of the accusatory stage of the criminal investigation and violated Petitioner's Fifth and Sixth amendment's rights.

Discussion.

1: The actions of Dr. Altavas.

Petitioner sought help from Dr. Altavas, who was acting as his physician because his regular physician was apparently unavailable. She in turn, believing that she was required by state statutes to report instances of suspected child abuse, notified the Child Protective Service, an agency of the state created for that purpose. She was then advised, unequivocally, that the fact pattern did not require her to report, and further, that the agency could not take or act on the information she supplied.

For reasons not clear, the doctor then asked the agency representative to notify the police, which apparently they did.

When she was later contacted by investigator Trimble, the doctor willingly revealed what the petitioner, her patient, had said, and shared her clinical or interview notes with the investigator. Later, the doctor willingly testified in the grand jury in the same vein, all in clear violation of the New York statute creating a physician-patient privilege, CPLR 5104.

It is clear from the statements made by investigator Trimble to the Petitioner's wife that their investigation was triggered by the information supplied by the doctor.

Nevertheless, the intermediate appellate court affirmed the conviction, saying that suppression of the information obtained was not necessary, in reliance on the case of *Peo. v. Greene*, 9 NY3d 277, 879 NE2d 1280 (2007).

In *Greene*, an officer went to a hospital and asked for information concerning any individuals suffering from certain injuries, consistent with the information he had about a suspect's injuries. The hospital provided the name, *inter alia*, of the defendant who was ultimately charged and convicted. The court held that:

> " ... even if there was a violation of the physician-patient privilege, the suppression of the evidence found as a result is not required. The physician-patient privilege is based on statute, not the State or Federal Constitution (*Klein,* 221 N.Y. at 453, 117 N.E. 942). Our decisions make clear that a violation of a statute does not, without more, justify suppressing the evidence to which that violation leads (*People v. Patterson,* 78 N.Y.2d 711, 716-717, 579 N.Y.S.2d 617, 587 N.E.2d 255 [1991])." [9 NY3d at 280].

In *Patterson*, the information obtained was a photograph from the file of an earlier, unrelated, investigation of the defendant. Pursuant to state law [NY CPL 160.50], that photograph should have been returned to the defendant (or his attorney), and not available in the second investigation.

There are two reasons why that holding should be reviewed. First, the information improperly obtained in both *Greene* and in *Patterson*, was not evidence in chief, and could not have been used at trial. It was the result of having the information that lead to other, more useful information which was used to convict the respective defendants.

Those holdings therefore seem to say that the "fruit of the poisonous tree" doctrine [*e.g., Wong Sun v. U. S.* , 371 US 471, 83 S. Ct. 407] does not apply.

However, in this case it is the very evidence obtained in violation of the statutes that served as evidence in chief against the Petitioner and it is not necessary to make finite distinctions as to how many 'steps' away from the illegality the police are permitted to go before the courts say 'stop.'

Second, totally ignored in the New York court's analysis is any reference to H.I.P.A.A. [Pub.L. 104-191, 1996], which also controls and limits dissemination of health information even more stringently than the New York 'privilege' statute.

Petitioner had certain privacy rights under the Constitution which were violated in the face of both state and federal statutes to the contrary, as well as in violation of the Fourteenth Amendment.

The result is that anyone suspected of criminal conduct in which medicine plays a part has to choose between seeking medical or psychiatric help and possibly incriminating him (her) self or not seeking help with the attendant consequences.

2: <u>Unlawful seizure of the Petitioner's journal</u>.

An examination of the search warrant application raises a question as to whether there was probable cause for the issuance of *any* warrant. The warrant application is clearly designed to authorize the search of a computer and computer storage devices on the expectation that the subject, here the Petitioner, has unlawful material, probably relating to child pornography, in his possession. Nothing in the warrant application provides any evidence to support the "expectation" that Petitioner has or is even interested in child pornography. However, that question was not raised below.

What was raised is the question of the extent of the authority the warrant granted the police and how they executed the warrant.

To validly obtain a search warrant, the Fourth Amendment requires the applicant to demonstrate probable cause and then describe, exactly, what is to be searched and what may be seized. In this case, whether or not there was probable cause for a warrant, the warrant itself, if valid, did not describe or even mention the journal or notebook, or indeed any material other than computer related material [the warrant is reproduced at A 5, showing the extent of a permissible search and limitation on the investigators].

As to describing items to be seized, the Court in *Marron v. U. S.*, 275 US 192 put it at page 196:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

The *Marron* Court also affirmed the principle that an improper seizure of purported evidence which is used at trial violates both the Fourth and Fifth amendments [*Marron* 275

US at 194: " ... It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. Agnello v. United States, 269 U. S. 20, 34, and cases cited, 46 S. Ct. 4, 70 L. Ed. 145."

By reading and then seizing the journal, the officer violated Petitioner's rights under the Fourth and Fifth Amendment and tainted the conviction.

3. Use of the Surreptitious Recording of Petitioner.

Petitioner's grand daughter, M. told her parents about the alleged sexual contact with her grandfather, and then wrote them a letter detailing the events. They contacted the Toronto police who in turn contacted the New York State Police.

There is no question but that the New York State police investigator Trimble traveled to Toronto, Canada and persuaded Petitioner's daughter-in-law to call Petitioner at his home, and coached the daughter-in-law in an effort to obtain incriminating evidence or admissions. At that point, the daughter-in-law became a police informant. Considering the situation, she was probably a willing participant, but an informant nonetheless.

In *People v. Jones*, 47 NY2d 528, 393 NE2d 443 a private security guard or "store detective" became a police agent when he was directed by the police to question the suspect. The questioning was done without any Constitutional or "Miranda" warnings , and the resultant statements were suppressed.

Petitioner of course had no idea he was being recorded or that the purpose of the call was to coax him into making useful admissions.

The police and the prosecutor at this point had enough information to formally charge Petitioner with the crimes for

which he was ultimately convicted, so that the case had progressed from investigative to accusatory.

Therefore when the petitioner received the call from his daughter-in-law he was entitled to the usual pre-interrogation warnings (so called "Miranda" warnings), and he had the right to counsel. See, generally, *Massiah v. U. S.*, 377 US 301. See also, *Spano v. New York*, 360 U.S. 315, 79 S. Ct. 1202, a pre-*Miranda* case, decided on Fourteenth Amendment grounds, where the Court noted, 360 US at 315, that the it must review the facts and make its own determination of the Constitutional issues.

On any such review it becomes clear that Petitioner's rights under the Fourth, Fifth and Fourteenth Amendments were violated.

CONCLUSION

Certiorari should be granted to resolve these issues.

Respectfully submitted,

Charles A. Schiano, Sr., Esq.,
Counsel of Record for Petitioner

In the
Supreme Court of the United States

William Gerald Whyte, Petitioner,

- vs -

State of New York, Respondent.

Appendix

**1 The People of the State of New York, Respondent
v
William G. Whyte, Appellant.
Supreme Court, Appellate Division, Fourth Department, New York
February 1, 2008
CITE TITLE AS: People v Whyte
HEADNOTES
Crimes
Evidence
Court properly refused to suppress evidence allegedly obtained as result of violation of defendant's physician-patient privilege.
Crimes
Evidence
Tape Recordings
Suppression of statements that defendant made during telephone conversation with victim's mother that was recorded by police was not warranted; statements were not obtained in violation of defendant's right to counsel because no formal proceedings had been commenced against defendant when conversation was recorded, and it could not be said that matter had otherwise progressed from investigatory to accusatory stage; in addition, statements were not obtained in violation of *1041 defendant's right against self-incrimination despite failure of victim's mother to inform defendant that police were recording conversation.
Crimes
Evidence
Pretrial motion to preclude People from presenting defendant's notebook in evidence was time-barred; in any event, although defendant contended that entries in notebook fell within scope of attorney-client privilege, he failed to establish that attorney-client relationship existed at time

entries were made or that entries were made at direction of defense counsel.

Schiano Law Office, P.C., Rochester (Charles A. Schiano, Sr., of counsel), for defendant-appellant.

R. Michael Tantillo, District Attorney, Canandaigua, for respondent.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 25, 2006. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the second degree and endangering the welfare of a child.

It is hereby ordered that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sexual act in the second degree (Penal Law § 130.45 [1]) and endangering the welfare of a child (§ 260.10 [1]). Contrary to the contention of defendant, County Court properly refused to suppress evidence allegedly obtained as a result of a violation of his physician-patient privilege. Indeed, "even if there was a violation of the physician-patient privilege, the suppression of the evidence found as a result is not required" (People v Greene, 9 NY3d 277, 280 [2007]). The court also properly refused to suppress statements that defendant made during a telephone conversation with the victim's mother that was recorded by the police. The statements were not obtained in violation of defendant's right to counsel because no formal proceedings had been commenced against defendant when the conversation was recorded, and it cannot be said that the matter had otherwise progressed from an investigatory to an accusatory stage (see People v Samuels, 49 NY2d 218, 221 [1980]; see generally Kirby v Illinois, 406 US 682, 688-690 [1972]; People v West, 81 NY2d 370,

373 [1993]). In addition, the statements were not obtained in violation of defendant's right against self-incrimination despite the failure of the victim's mother to inform defendant that the police were recording the conversation (see People v Lee, 277 AD2d 1006, 1007 [2000], lv denied 96 NY2d 785 [2001]; People v Williams, 242 AD2d 867 [1997], lv denied 91 NY2d 899 [1998]).

The pretrial motion of defendant seeking to preclude the People from presenting his notebook in evidence was time-barred (see CPL 255.20 [1]; People v Hoffman, 283 AD2d 928, 929 [2001], lv denied 96 NY2d 919 [2001]), and defendant failed to demonstrate good cause for failing to make that motion within 45 days after arraignment (see CPL 255.20 [3]; People v McQueen, 307 AD2d 765, 766 [2003], lv denied 100 NY2d 622 [2003]). In any event, defendant's contention lacks merit. In *1042 support of his motion, defendant contended that the entries in the notebook fell within the scope of the attorney-client privilege, but defendant failed to establish that the attorney-client relationship existed at the time the entries were made or that the entries were made at the direction of defense **2 counsel (see generally People v Mitchell, 58 NY2d 368, 373 [1983]). Defendant failed to preserve for our review his contention that the notebook was outside the scope of the search warrant, pursuant to which it was seized (see CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Present-- Hurlbutt, J.P., Martoche, Smith, Lunn and Peradotto, JJ.

Copr. (c) 2008, Secretary of State, State of New York.

NY,2008. People v Whyte

END OF DOCUMENT

(The decision of the Court of Appeals of New York is referenced in the New York Supplement and North Eastern Reporter in a table captioned 'Applications for Leave to Appeal - Criminal'.)

Court of Appeals of New York

People
v.
William G. Whyte

May 08, 2008

4th Dept.: 48 A.D.3d 1040, 850 N.Y.S.2d 316 (Ontario)

Ciparick, J.

Denied.

N.Y. 2008.
People v. Whyte
10 N.Y.3d 872, 890 N.E.2d 261, 860 N.Y.S.2d 498 (Table)

END OF DOCUMENT

ONTARIO COUNTY COURT
Town of South Bristol
County of Ontario
State of New York

To any police officer of the New York State Police:

1.You are hereby authorized and directed to search for and seize the following property:

A)Property constituting evidence of crime, tending to demonstrate that an offense was committed, to wit:

1.Computer hardware used to store or transmit visual depictions of pornographic images and electronic mail messages, commonly referred to as '~e-mail", between WILLIAM GERALD WHYTE and MEGAN WHYTE.

2.Computer software used to store or transmit visual depictions of pornographic images and electronic mail messages, commonly referred to as "e-mail", between WILLIAM GERALD WHYTE and MEGAN WHYTE.

3.Computer-related documentation, correspondence, notes and letters showing communication between WILLIAM GERALD WHYTE and MEGAN WHYTE.

4.*Government issued documentation allowing passage to and from the United States of America in the name of WILLIAM Gerald White* [this paragraph handwritten and added by the judge].

2.You are authorized to search the following premises: 5548 Vardon Drive, Town of South Bristol, County of Ontario, State of New York further described as a tan colored two story house with brown shutters. This residence has brown colored roof shingles and a green plaque depicting 5548 Vardon Drive affixed to the front left corner of house. 5548 Vardon Drive sits on the West side of Vardon Drive.

3. Pursuant to CPL 690.45 (6), this warrant must be executed between 6:00 A.M. and 9:00 P.M.

4. This warrant must be executed not more than 10 days after the date of issuance and any property seized shall be returned and delivered to the court without unnecessary delay.

Dated this *15TH* day of July, 2005

/s/ Craig Doran

Hon. Judge Craig Doran
Ontario County Court
County of Ontario
State of New York